FragranceNet.com, Inc. v. FragranceX.com Inc. Doc. 8

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VIA ELECTRONIC FILING and
FIRST CLASS MAIL

Hon. Joseph F. Bianco
United States District Court
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11722

Re: FragranceNet.com, Inc. v. FragranceX.com, Inc., CV-06-2225 - Pre-Motion Conference Request

Dear Judge Bianco:

We are counsel for defendant. We are writing to request a pre-motion conference with this Court to seek leave to move to dismiss plaintiff's Amended Complaint under Fed. R. Civ. P. 8(a) and 12(b)(6). The basis for defendant's motion to dismiss is as follows:

Plaintiff's Amended Complaint claims copyright infringement. Plaintiff and Defendant are competing on-line retail stores that sell perfumes and related goods. Plaintiff's and Defendant's websites, in addition to listing the products they carry (all of which are manufactured by others), contain photographs of the products. Plaintiff claims that it made thousands of photographs of products, that it owns copyrights in the photographs, and that it has posted them on its website. Plaintiff alleges that Defendant, beginning at an unstated time before August 1, 2005, infringed copyrights in more than eight hundred of those photographs by posting copies of the photographs on Defendant's website, also to illustrate the products being offered.

Assuming for purposes of the motion that Plaintiff's photographs are copyrightable and that they do not infringe any copyrights owned by the products' manufacturers in the appearance of the products and their packaging, Plaintiff's complaint is still insufficient because it fails to identify more than a small fraction of the photographs allegedly infringed or the photographs that allegedly infringe them.

Fed. R. Civ. P. 8(a)(2), requires a plaintiff to allege "a short and plain statement of the claim showing that the pleader is entitled to relief." In copyright infringement cases, the District Courts in New York construe Rule 8 to require the complaint to allege: "(1) which specific original works are the subject of the copyright claim, (2) that plaintiff owns the copyrights in those works, (3) that the copyrights have been registered in accordance with the statute, and (4) by what acts [and] during what time the defendant infringed the copyright." Kelly v. L.L. Cool

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J., 145 F.R.D. 32, 35 (S.D.N.Y. 1992), aff'd, 23 F.3d 398 (2d Cir. 1994), cert. denied, 513 U.S. 950 (1994).

Plaintiff's Amended Complaint fails to meet the first and fourth elements of this test and therefore fails to satisfy Rule 8. As to the first element, other than alleging that Defendant has "copied more than eight hundred (800) of the Photographs," Plaintiff has not further identified the photographs allegedly infringed and has attached pictures illustrating only 50 of the alleged 800 to its complaint. That leaves over 90% (750 out of 800) of the allegedly infringed photographs unidentified. This is insufficient. See Sharp v. Patterson, 2004 U.S. Dist. LEXIS 22311, at *48-49 (S.D.N.Y. Nov. 3, 2004) (motion to dismiss granted: "obligation to identify the … infringed works in a pleading is not satisfied by alleging mass infringement of 69 different copyrighted letters by five different novels"); Plunket v. Estate of Doyle, 2001 U.S. Dist. LEXIS 2001, at *13-14 (S.D.N.Y. Feb. 22, 2001) (multi-page schedule of many allegedly infringed works and copyright registration numbers for only nine of those works, identification of infringed works held insufficient); DiMaggio v. International Sports, Ltd., 1998 U.S. Dist. LEXIS 13468, at *5 (S.D.N.Y. Aug. 31, 1998) (insufficient to allege "that the image The Scream and multiple images referred to as Mike Tyson in the Ring were created and copyrighted by him, and were copied largely and placed on the market by the defendants," but failed "to specify which original works are the subject of the copyright claim," and instead referred "to nebulous multiple images entitled Mike Tyson in the Ring and The Scream"); Tom Kelley Studios v. International Collectors Soc'y, 1997 U.S. Dist. LEXIS 14571, at *3 (S.D.N.Y. Sept. 25, 1997) (complaint insufficient because it contained "no allegations of specific acts of infringement with respect to specific copyrights owned by plaintiffs").

With respect to the fourth element of the Rule 8 pleading test, Plaintiff asserts that "[a]t some time prior to August 1, 2005, [Defendant] copied more than eight hundred (800) of the Photographs without the authorization of [Plaintiff] and posted them on its competing on-line fragrance store." Plaintiff fails to identify which of Defendant's photographs allegedly infringe Plaintiff's copyrights for, again, over 90% of the alleged infringements. In other words, Plaintiff fails to identify the alleged acts of infringement.

We observe that, based on the Amended Verified Complaint, Plaintiff knew of the alleged infringements 9 months ago and sent in its application for copyright registration in February of this year. Plaintiff has had plenty of time to identify all of the claimed infringing photographs.

Given these defects in Plaintiff's Amended Complaint, Defendant wishes to file a motion to dismiss the Amended Complaint or, alternatively, to dismiss the Amended Complaint insofar as it relates to unidentified infringements of unspecified copyrighted photographs. Defendant respectfully requests this Court to either hold a pre-motion conference concerning this potential motion or to grant Defendant leave to file its motion to dismiss.

If this Court sets a pre-motion conference, I respectfully request that it take place not before July 17, as I will be out of the office until then.

Respectfully,

David Rabinowitz

DR:jt

cc: Robert L. Sherman, Esq. (via facsimile and first class mail)
Catherine M. Clayton, Esq. (via facsimile and first class mail)